Supreme Court of the United States.

October Term, 1913.

No. 288.

LEO WEIDBORN,

PETITIONER,

vs.

BENJAMIN A. LEVY, Trustee,

RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

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CASES CITED.

Supreme Court of the United States.

October Term, 1919.

No. 203.

LEO WEIDHORN, PETITIONER,

v.

BENJAMIN A. LEVY, TRUSTEE, RESPONDENT.

BRIEF FOR RESPONDENT.

Statement of Facts.

The respondent, as trustee in bankruptcy of J. Herbert Weidhorn, brought a bill in equity, under sections 67 and 70 of the Bankruptcy Act (Comp. St. 1916, § 9651 and § 9654), against the petitioner to recover property conveyed to him by his brother, the bankrupt, prior to the bankruptcy. The bill was filed in the office of the Referee in bankruptcy, to whom the case had been generally referred by the District Court under section 22 of the Bankruptcy Act (Comp. St. 1916, § 9606), according to General Order XII. The Referee caused process to issue thereon by the Clerk of the District Court under General Order III. Subsequently the case was heard upon its merits by the Referee, and a decree was entered holding the conveyances void and ordered the petitioner to account for or restore the property transferred.

The petitioner thereupon asked for a review of the

Referee's decree by the District Court on the ground that his findings and conclusions were not justified by the evidence. It was not alleged that the Referee acted without jurisdiction. We do not contend that consent of the petitioner could give jurisdiction if none was given by the Bankruptcy Act. We do not, therefore, advert to the question whether by appearing and answering to the merits there was seasonable objection to the Referee's jurisdiction by this petitioner.

The Referee's certificate to the District Court transmitted the evidence and also recited that the petitioner had contended "that the referee, sitting as a court of bankruptcy, has no jurisdiction," and that he had ruled to the contrary.

Without passing on the case on its merits, the District Court dealt only with the question of jurisdiction of the Referee, and ruled that he had no jurisdiction and ordered the bill dismissed.

The trustee in bankruptcy thereupon filed a petition to revise the proceedings of the District Court in the Circuit Court of Appeals for the First Circuit. After hearing, that Court by an unanimous decision (reported in 253 Fed. 28) ordered a decree reversing the decree of the District Court and held that the Referee had jurisdiction to entertain the bill in equity. The case was ordered remanded to the District Court for further proceedings.

There are but two issues involved in the present argument: *First.* Was a petition to revise the proper way to raise in the Circuit Court of Appeals the correctness of the ruling on the question of jurisdiction of the District Court? *Second.* Has a Referee in bankruptcy jurisdiction of plenary suits of this character?

ARGUMENT.

I.

A PETITION TO REVISE IN MATTER OF LAW THE PROCEEDINGS OF THE DISTRICT COURT WAS THE CORRECT METHOD TO BRING BEFORE THE CIRCUIT COURT OF APPEALS THE ISSUE.

The decision of the District Court dealt only with the question of jurisdiction. The Circuit Court of Appeals was only asked to determine the correctness of this one issue. The merits of the controversy were not considered. The sole question raised was as to the extent of a Referee's jurisdiction—a question of procedure.

If the judgment to be reviewed was a step in a bankruptcy proceeding, the remedy to correct an error of the District Court is by petition to revise under section 24*b* of the Bankruptcy Act (Comp. St. 1916, § 9608 (B)) If it was a controversy arising in a bankruptcy proceeding, then an appeal from the judgment of the District Court to the Circuit Court of Appeals under section 24*a* (Comp. St. 1916, § 9608 (A)) would have been correct.

Mason v. *Wolkowich,* 150 Fed. 699 (C.C.A. 1).

> "The distinction between 'proceedings in bankruptcy' reviewable under Section 24 (B) and the 'controversies arising in bankruptcy proceedings' appealable under Section 24 (A) is clearly defined; the former including 'administrative orders and decrees in the ordinary courses of bankruptcy between the filing of the petition and the final settlement of the estate,' and the latter including 'those independent or plenary suits which concern the bankrupt's estate and arise by intervention or

> otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors.' "

Barnes v. *Pampel,* 192 Fed. 525, 527 (C.C.A. 6).

It is now well settled that, where it is sought merely to present to the Circuit Court of Appeals a question as to whether a District Court erroneously exercised, or refused to exercise, jurisdiction to determine the merits of an adverse claim to property, the question of law so raised is a question of a bankruptcy proceeding, and is reviewable by a petition to revise under section 24*b* of the Bankruptcy Act.

Schweer v. *Brown,* 195 U.S. 171.
Gibbon v. *Goldsmith,* 222 Fed. 826 (C.C.A. 9).
Shea v. *Lewis,* 206 Fed. 877 (C.C.A. 8).
Graham v. *Faith,* 253 Fed. 32 (C.C.A. 1).

Gibbon v. *Goldsmith:*

> "This case presents the beclouded question which arises in nearly every case in which review of decisions in bankruptcy is sought in an appellate court. Is the remedy by appeal or by petition to revise? Is the judgment to be reviewed a step in a bankruptcy proceeding, or is it a controversy arising in a bankruptcy proceeding? The answer to the question in a case of this kind depends upon the nature of the proceeding in the bankruptcy court, and the questions which are to be presented for review to the appellate court. It is to be observed that the petitioner in this case does not attempt to bring before this court the merits of a controversy which was decided in the court below. She presents only the question of the jurisdiction of that court to deal with the subject-matter of the proceeding. The prayer of her petition is that it be adjudged that the District Court had no juris-

diction over any of the funds realized from the community property or the sale thereof, and had no jurisdiction to sell or dispose of said property, and no jurisdiction to determine in a summary proceeding the rights of the petitioner in or to said funds or said lands. (1) If the petitioner were here seeking a reversal of the judgment on the merits, and asserting the adverse right to receive all or a portion of the funds in the hands of the court in the proceeding which was instituted therein, her remedy would clearly be by appeal. For wherever in a proceeding such as this, a third person intervenes in the bankruptcy court and asserts an independent and superior title to the property held by the trustee, claiming the right to recover and remove the same from the jurisdiction of the bankruptcy court as part of the estate to be administered, he institutes a controversy in a bankruptcy proceeding, whether he intervenes by an original petition, or is brought into court upon the application of the trustee, and to review the judgment of that court his remedy is by an appeal under the provisions of section 24b. . . . [Cases cited.] . . .

"But where it is sought, as in this case, to present to the Circuit Court of Appeals the question whether the District Court erroneously exercised jurisdiction to determine the merits of an adverse claim to property, the question of law so raised is a question of a bankruptcy proceeding, and it is reviewable by a petition to revise under section 24b of the Bankruptcy Act. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; Schweer v. Brown, 195 U. S. 171, 25 Sup. Ct. 15, 49 L. Ed. 144; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Gill, 190 Fed. 726, 111 C. C. A. 454; In re McMahon, 147 Fed. 684-687, 77 C. C. A. 668; In re Blum, 202 Fed. 883, 121 C. C. A. 241; Shea v. Lewis, 206 Fed. 877, 124

C. C. A. 537; In re Goldstein, 216 Fed. 887, 133 C. C. A. 91."

Shea v. *Lewis:*

"The errors mainly relied upon as stated in the brief are: First, that the referee was without jurisdiction in summary proceedings to try the right and title of claimant Abbie A. Shea to the real and personal property she is ordered to turn over to the trustee . . .

"(1) Out of abundance of caution appellants and petitioners present this case on appeal and by petition to revise. In the view we take, it is unnecessary to determine whether appeal will lie. It is conclusively established that where, in a case like this, the District Court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

To the petitioner's argument that "when the decree complained of is in relation to a plenary suit the exclusive remedy is by appeal under section 24a even though the only question before the Circuit Court of Appeals is a question of law" the opinion of Judge DODGE presents the complete answer, "That a result on the merits, had there been jurisdiction, could have been reviewed here only on appeal, does not prove that we are without power to determine the question of jurisdiction under such a petition as this."

In re Weidhorn, 253 Fed. 28, 29 (C.C.A. 1).

An instance where a petition to review was entertained in the Circuit Court of Appeals to determine the correctness of a decision of a District Court as to the extent of the jurisdiction of a Referee similar to the present is—

In re Gill, 190 Fed. 726 (C.C.A. 8).

II.

A COURT OF BANKRUPTCY HAS JURISDICTION OVER SUITS SUCH AS THE PRESENT ONE BROUGHT BY A TRUSTEE IN BANKRUPTCY.

The suit at bar, brought to recover property fraudulently conveyed by the bankrupt, may properly be brought by the trustee in bankruptcy in a Court of Bankruptcy.

> Bankruptcy Act, § 70*e* (Comp. St. 1916, § 9654*e*).

The issue therefore narrows down to the question whether this suit brought before the Referee was brought in a Court of Bankruptcy. It involves an examination of the standing, status, and functions of a Referee under the provisions of the Bankruptcy Act in order properly to determine this question.

III.

THE STATUS OF A REFEREE IN BANKRUPTCY.

It has been well stated that the present Bankruptcy Act is a compromise not only of commercial interests and of methods of practice, but even of principles.

> *In re Hammond,* 98 Fed. 845 (D. Mass.).

Under the Act of 1867 the Referee in bankruptcy had only ministerial powers, while the present Act adds judicial to these ministerial powers.

> *Mueller* v. *Nugent,* 184 U.S. 1.

"An expression used in the debates in Congress

was that the referee under the new act was to be almost a judge in chambers. There is a great deal to be said in favor of extensive jurisdiction in the hands of the referees in view of their knowledge of local conditions and power to facilitate the disposition of the ever increasing bankruptcy business of the country."

Matter of Valez, 39 A.B.R. 307, 310.

The status of the Referee in bankruptcy has been often described as "clothed with the authority of a judge" or as exercising "much of the judicial authority of that [the Court of Bankruptcy] Court."

"Referees in bankruptcy are appointed by the Court of bankruptcy and take the same oath of office as judges of United States Courts. Each case in bankruptcy is referred by the Court of bankruptcy to a referee and he exercises much of the judicial authority of that Court."

White v. *Schloerb,* 178 U.S. 542, 546.

"We think the referee has the power to act in the first instance in matters such as this when the case has been referred and in aid of the court of bankruptcy, and exercises in such case 'much of the judicial authority of that court'. White vs. Schloerb, 178 U.S., 542. By a petition for review the matter can be carried to the bankruptcy court and the entire record and findings laid before that tribunal, as was done here."

Mueller v. *Nugent,* 184 U.S. 1.

"Referees in their hearing within the scope of their powers are clothed with the authority of judges."

In re McIntyre, 142 Fed. 593.

"But the bankrupt proceedings, after adjudica-

tion, had been referred to this referee, who had, therefore 'much of the judicial authority of the court.' "

Hinds v. *Moore*, 134 Fed. 221, 224 (C.C.A. 6) (LURTON, J.).

It may fairly be said that the Act contemplates that the referee and judge shall have equal powers as a Court of Bankruptcy except where the Act expressly limits any specified function to the judge alone.

" 'Courts' shall mean the Court of Bankruptcy in which the proceedings are pending and may include the referee."

Bankruptcy Act, § 1 (7) (Comp. St. 1916, § 9585 (7)).

"Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided. . . ."

Bankruptcy Act, § 38 (Comp. St. 1916, § 9622).

Referees are required to take the same oath of office as that prescribed for judges of United States Courts.

Bankruptcy Act, § 36 (Comp. St. 1916, § 9620).

"The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in

equity cases in circuit courts of the United States."

Bankruptcy Act, § 42*a* (Comp. St. 1916, § 9626 (A)).

Carrying out this underlying idea of the judicial functions of the Referee, the Supreme Court in the General Orders provides:

"All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be attested by the Clerk; and blanks, with the signature of the clerk and seal of the court may, upon application, be furnished to the referees."

General Order III.

"1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter *all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.*"

"3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the Referee to ascertain and report the facts."

General Order XII.

In other connections it is obvious that the Referee is the official meant when the Court is mentioned.

> "Upon application to the Court . . . the trustee may be authorized to sell . . . the bankrupt estate at private sale . . ."
>
> General Order XVIII (2).

> "Upon petition by a bankrupt, creditor, receiver or trustee setting forth that a part or the whole of the bankrupt's estate is perishable . . . the Court if satisfied of the facts stated . . . may order the same to be sold . . ."
>
> General Order XVIII (3).

Forms 42, 43, 44, 45, and 46, as well as the uniform practice in all jurisdictions, recognize that the Court in this instance is the Referee.

Section 2 (3) (Comp. St. 1916, § 9586 (3)) and section 44 (Comp. St. 1916, § 9628) provide that the Courts of Bankruptcy may appoint receivers and, the creditors failing to choose, may appoint trustees. In the first instance the Referee in some cases acts as the Court, and in the latter always.

Compare also § 64 (A) (Comp. St. 1916, § 9648 (A)):

> "It is conceded that the term 'court' as used in this paragraph included the Referee."
>
> *In re Tilden,* 91 Fed. 500.

In the absence of the Judge from the District Court the Referee may be called upon to discharge his judicial functions.

> "Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is ab-

sent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee."

Bankruptcy Act, § 18 (*g*) (Comp. St. 1916, § 9602 (G)).

It is fairly said: "Again where the Bankruptcy Court has jurisdiction, the referee has also jurisdiction except when the case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt or seeks a discharge from bankruptcy."

In re Brenner, 190 Fed. 209, 211 (M.D. Pa.).

This idea of the co-extensive jurisdiction of Referee and judge, except where otherwise expressly specified in the statute, finds expression in Judge SANBORN's words:

"Moreover, if the District Court had jurisdiction to require the mortgagee, by a notice or order to show cause, to present its claim before it, or be barred of any lien upon, or right to share in, the proceeds of the property in its possession, the referee had like power in this particular instance; for neither the Bankruptcy Act nor the General Orders in Bankruptcy require such a proceeding to be had before the judge or the Court."

In re Rochford, 124 Fed. 182, 184 (C.C.A. 8).

The Circuit Court of Appeals for the Second Circuit has pointed out that the Referee is constituted the Court of Bankruptcy for all purposes when a case is once generally referred to him, except in the specific instances expressly excepted by the Act or the General Orders.

"The proceedings required by the act to be

had before the judge are applications for discharge, for approval of compositions, for punishment for contempt, contested involuntary petitions in bankruptcy, and all petitions for adjudication when the judge is in the district. The proceedings other than these required by the general orders to be had before the judge are applications for injunctions to stay proceedings of a court or officer of the United States or of a state, and for the removal of a trustee.

"No question is made but that this case had been referred generally to the referee, as provided in section 22 of the act (30 Stat. 552 (U.S. Comp. St. 1901, p. 3431)). The referee, therefore, constituted a court, with all the powers of the court, for the purposes of this examination."

In re Abbey Press, 134 Fed. 57 (C.C.A. 2).

IV.

THE REFEREE HAD JURISDICTION TO ENTERTAIN THESE PROCEEDINGS.

Nothing, either in the Act or in the General Orders, expressly requires a proceeding upon a bill in equity to recover property claimed by a trustee in bankruptcy whereof "any court of bankruptcy" has jurisdiction under section 70(E) (Comp. St. 1916, § 9654) to be had before the Judge.

Under section 22*a* of the Bankruptcy Act (Comp. St. 1916, § 9606) the District Judge may refer a case "generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues." There is no suggestion in the case at bar but that the reference to the Referee was general, and that in the absence of any restrictive rule or order of the District Court the Ref-

eree, by virtue of the general order of reference, acquired all the jurisdiction that any Referee could acquire under section 38 of the Bankruptcy Act (Comp. St. 1916, § 9624).

The proceedings in this case before the Referee in bankruptcy were not summary, but plenary. They were begun by the filing of a bill in equity, the issuing of a subpœna out of the office of the Clerk of the District Court returnable on a day fixed, and an opportunity to the respondents to file pleadings and be heard upon the matters at issue was given and accepted.

The decision of the Court of Appeals which is now under review is the only one on the subject by any Court of final authority. Other than the decision of the District Court, which was reversed, such citations as are to be found, we submit, with a single exception, and that an opinion of a Referee of North Dakota (*In re Overholzer*, 23 A.B.R. 10), are to the effect that the Referee has jurisdiction to entertain such proceedings as the present.

In re Steuer, 104 Fed. 976.
In re Ballou, 33 A.B.R. 21.
In re Shults & Marks, 11 A.B.R. 690.
In re O'Brien, 21 A.B.R. 11.
In re Scherber, 131 Fed. 121.

Cases such as *In re Carlile*, 199 Fed. 612, cited on our opponent's brief, deal with the jurisdiction of a Referee in summary proceedings over rights and title adversely claimed by third persons, and is beside the point.

In re Shults & Marks, 11 A.B.R. 690.

While reference is made in the opinion to a standing rule of the local District Court, that rule is in effect no more than an order for a general reference of a case to a Referee, such as is used in the practice in Massachusetts, followed in our case. We submit that Judge MORTON, who attempted to distinguish this case in his opinion in the District Court, was in error in thinking that a special rule was the deciding factor in this decision. Especially is this so as no rule of Court can confer jurisdiction where otherwise none exists.

In re O'Brien, 21 A.B.R. 11.

While at one stage of the case there was a consent to proceeding before the Referee, later new pleadings were filed, to which the consent did not apply, and the proceedings in question were *in invitum*. Judge MORTON, who also sought to distinguish this case, has lost sight of this in assuming that the case was one of "jurisdiction by consent."

The Circuit Court of Appeals, however, did not base its decision merely on following express precedents, but decided in favor of the jurisdiction of the Referee on what we respectfully submit is a logical construction of section 38 (4) (Comp. St. 1916, § 9622). It held that "an intent on the part of Congress may reasonably be inferred to permit the exercise of all functions of the bankruptcy courts not specifically excepted, by a number of local officers of the court, easily accessible throughout each district, instead of empowering the District Judge alone to exercise them, at the statutory places for holding his court."

V.

THE PRACTICE OF YEARS HAS RECOGNIZED THE EXISTENCE OF THIS JURISDICTION IN A REFEREE.

In the many years of practice under the present Bankruptcy Act, without express decisions, the profession has come to recognize a Referee in bankruptcy as having jurisdiction to entertain suits such as the present. Perhaps this of itself is not a conclusive argument, but when over many years and in different parts of the country this has come to be accepted as a proper interpretation of the Act, any Court should give great weight to that fact and its far-reaching effect. While we have not attempted any exhaustive collection of cases of this character, cases are numerous where such jurisdiction has in fact been exercised by Referees. Such cases as the present have been decided by Referees and their decisions reviewed not only by District Courts, but also by Circuit Courts of Appeal and by the United States Supreme Court, without any suggestion that the Referee's action in entertaining such suits and giving a decision was beyond his jurisdiction. It is well recognized that the rule—

> "is inflexible and without exception which requires this Court [the Supreme Court of the United States] of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental

question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

Mansfield, C. & L.M.R. Co. v. *Swan,* 111 U.S. 379, 382.

It is equally the duty of all other Federal Courts *sua sponte* to pass upon the question of jurisdiction in each case presented.

Hutchinson v. *American Palace Car Co.,* 104 Fed. 182 (D.C. Me.):

Thus, "A question of jurisdiction is fundamental and underlies all other questions arising in the course of a litigation. Such a question may be raised at any time, in any mode, and at any stage, as every step taken in the progress of a cause is an assertion of jurisdiction, and the court may, of its own motion, make the objection or institute such investigation as may be necessary to establish or defeat it. This is especially true of the federal courts, as being courts of limited or statutory jurisdiction."

Kreider v. *Cole,* 149 Fed. 647, 649 (C.C.A. 3):

These instances of the exercise of jurisdiction by a Referee which have been passed upon by higher Courts, have therefore more significance than merely cases which have slipped by without notice.

Studley v. *Boylston National Bank,* 229 U.S. 523:

A proceeding was instituted before a Referee to recover an alleged preference. Referee found for

defendant. Before the Circuit Court of Appeals the Referee's judgment was affirmed, 200 Fed. 249. In the Supreme Court the opinion calls attention to the fact that "the case was tried by the Referee, who sustained the bank's claim of set-off, holding that the payments were not transfers." No point is raised as to jurisdiction.

Clark v. *Rogers*, 228 U.S. 534:

This case was a proceeding to recover a preference brought before a referee. In the opinion of Judge DODGE, printed on page 10 of the record presented before the Circuit Court of Appeals for the First Circuit, it is stated that a motion to dismiss for want of jurisdiction was originally filed by the respondent before the referee, but when the case came before the District Court it was stated that the respondent was willing that the Court should proceed with the case if the Court was of opinion that it lawfully could. The Court gave judgment in favor of the trustee. On appeal to the Circuit Court of Appeals this judgment was affirmed without reference to the question of jurisdiction (183 Fed. 518). The Supreme Court affirmed the decree without adverting to the question of jurisdiction.

In re States Printing Co., 238 Fed. 775 (C.C.A. 7):

Trustee in bankruptcy brought suit before a referee to set aside an alleged preference. Judgment for defendant. On review before the District Court, the judgment was reversed. The Circuit Court of Appeals affirmed the judgment of the District Court.

In re Kearney, 167 Fed. 995 (E.D. Pa.):

Proceedings before a referee to recover a preference. Judgment for plaintiff affirmed by District Court.

In re Starkweather & Albert, 206 Fed. 797 (W.D. Mo.):

Proceedings before a referee to set aside alleged preferential conveyance. Judgment for plaintiff affirmed by District Court.

In re Hoffman, 199 Fed. 448 (D. N.J.):

Petition filed before referee to obtain return of bonds transferred to defendant. Certain evidence being rejected at the hearing on review, the district judge held that it should have been admitted, reversed the judgment, and remanded the proceedings to the referee with instructions to receive the testimony.

Peninsula Bank v. *Wolcott*, 232 Fed. 68 (C.C.A. 4):

In this case the trustees of the bankrupt instituted a proceeding before the referee to set aside as a preference a trust deed given to secure indebtedness of the bankrupt. The referee reported the deed of trust invalid as an illegal preference. Upon petition for review his finding was affirmed by the District Court. The Court of Appeals entered an order modifying the decree of the District Court, holding the deed of trust valid as a security for some of the notes, and invalid as to one note.

In re Berry, 247 Fed. 700 (E.D. Mich.):

In this suit plenary proceedings were begun by the trustee before a referee against a third person for the recovery of property alleged to belong to the bankrupt estate. The referee denied the petition. On review before the District Court petition denied. The Court ruled that there was jurisdiction in the referee to entertain such plenary proceedings in this case on the ground that there

had been a waiver of objection to jurisdiction of the Court.

VI.

TO HOLD THAT THE REFEREE HAS SUCH JURISDICTION IS DESIRABLE.

(A)

It offers an opportunity to try issues which are usually closely related to the ordinary bankruptcy proceedings before a magistrate who is peculiarly fitted to deal intelligently with such cases from the experience and familiarity which a Referee in bankruptcy must gather from his regular official duties. The kind of questions which are here in litigation are constantly being heard and dealt with by Referees in bankruptcy. When a creditor presents a claim for allowance, on objection that the claim ought not to be allowed because he has received a preference, a Referee hears the very issue involved in the present suit. If the Referee decides that such a preference has been given, it is *res judicata* in subsequent litigation to recover back the property given as the preference.

Lincoln v. *Peoples Nat. Bank*, 260 Fed. 422.

If the property had been in the trustee's custody when the controversy arose over a claim to it presented by a creditor, or if a lien was claimed thereon, the Referee has undoubted jurisdiction to try the issues, although it involves the very kind of law ques-

tions and evidence of the same character that are involved in the present case.

Hewitt v. *Berlin Machine Works*, 194 U.S. 296.
York Mfg. Co. v. *Cassell*, 201 U.S. 344.
Nisbet v. *Federal Title & Trust Co.*, 229 Fed. 644 (C.C.A. 8).
Wuerpel v. *Commercial Bank*, 238 Fed. 269 (C.C.A. 8).
Dunlap v. *Baker*, 239 Fed. 193 (C.C.A. 4).
Galbraith v. *Robson-Hilliard Grocery Co.*, 216 Fed. 842 (C.C.A. 8).

In view of this, Judge Morton's criticism that to allow the Referee to hear such controversies as the present "would amount to a peculiar delegation of the general equity powers of the Court, the exact limitation of which, territorial or otherwise, it is not easy to understand" seems to have failed to take into consideration that this objection is one merely to the jurisdiction of the Referee, due to the form in which the question is presented, inasmuch as the Referee has unchallenged general equity powers to dispose of this very line of litigation if raised when property concerned in the litigation is in the custody of the Bankruptcy Court.

Again, there are also cases where a Referee deals with just such issues as these in summary proceedings. After ascertaining that the defendant has an adverse claim, but raises no question as to jurisdiction of the Referee (*i.e.*, consents either directly or indirectly to the case proceeding before the Referee), the litigation continues on the merits, a judgment is entered by the Referee and on appeal the Courts

deal with the matter on the assumption that the Referee has jurisdiction and power after hearing to render a judgment (Bankruptcy Act, § 63*b;* Comp. St. 1916, § 9647).

In re Carlile, 29 A.B.R. 373.
Fairbanks Shovel Co. v. *Wills,* 240 U.S. 642.
Chauncey v. *Dyke Bros.,* 119 Fed. 1 (C.C.A. 8).
In re Connolly, 100 Fed. 620 (E.D. Pa.).

(B)

It offers a local forum before which such trials may be had without necessitating parties in some of the districts going far from home, dragging their witnesses with them to the statutory place where the District Judge sits, and thus saves both time and expenses for litigants.

> "The object of this provision (Section 38 (4)) was to bring the Courts of Bankruptcy home to the local attorneys, throughout the various districts, and to relieve them and litigants, both debtors and creditors, from travelling long distances to attend Federal Courts. In other words, Congress intended to remove the objections which have always been raised of late against the passage of a bankruptcy act by putting a court of bankruptcy into each county."
>
> *In re Murphy,* 3 A.B.R. 499, 507.

(C)

In busy districts like Massachusetts and New York it affords a speedier trial for these cases than can be had before District Judges, already overworked, when such cases must be sandwiched in with naturalization,

criminal trials, admiralty, bankruptcy, patent hearings, ordinary civil jury trials, and other equity proceedings.

(D)

If in any district it is deemed desirable for one reason or another to cut down the jurisdiction of Referees, either in a particular case or in a given class of cases, as was pointed out in the opinion in the Circuit Court of Appeals (253 Fed. 31), it is always in the judge's power to cut down the jurisdiction of a Referee by limiting the power given him in the order of reference.

Moreover, as Judge LOWELL says in the Steuer case (104 Fed. at 980):

> "It is pertinent to inquire what would be the practical result if original jurisdiction in proceedings like these were held to reside in the judge alone. The judge, being too heavily burdened to hear the evidence, would refer the petition to the referee under General Order XII, subd. 3, or by the analogy of that order. The referee would hear the evidence, and report it to the judge, with his conclusions thereupon. Such a proceeding, while quite different in form from that to be followed if the referee has original jurisdiction, yet does not greatly differ from the latter proceeding in practical result."

In the present case Judge DODGE, speaking for the Circuit Court of Appeals, makes practically the same suggestion (253 Fed., at 31):

> "Such a construction of the above provisions of the act involves no substantial prejudice to any right of a defendant against whom such a bill

is brought. If it were addressed to the judge, instead of the referee, filed, not with the referee, but in the clerk's office, and heard by the referee under directions from the court to ascertain the facts and report thereon, no one would doubt that the 'duties conferred upon the bankruptcy court' in the case had been so far properly performed. The referee's report, with the evidence before him, if necessary, would then come before the District Judge for confirmation or disaffirmance, and the final decree of the court accordingly would follow. If heard and decided by the referee, as in this case, a petition for review would also bring the whole matter, with the evidence heard, before the judge, whose order affirming or disaffirming that made by the referee would also amount to a final decree by the District Court. We see no difference between the two methods of reaching a final result in the District Court sufficiently important to require the conclusion that the latter method cannot be one contemplated by the act."

VII.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN LINE WITH ENLIGHTENED EQUITY PROCEDURE.

It is of course fundamental that the whole theory and practice of bankruptcy is modeled on and developed from chancery principles and practice. The Referee in bankruptcy, after the case is referred to him, occupies the same relation to the case that a District Judge does to a receivership proceeding in which he sits after the appointment of a receiver. More and more the courts of equity have recognized that it makes for a better and more efficient adminis-

tration of receiverships in courts of equity if the Judge sitting in the main proceedings can pass upon the collateral and incidental litigation that is bound to arise without remitting parties to other jurisdictions or other tribunals to try out conflicting rights. Therefore, if just such issues and litigation as exist in preference cases were to arise in a United States receivership proceeding, the sitting District Judge would entertain a petition by the receiver and order the parties to appear before him and try out their rights in the receivership proceedings.

White v. *Ewing*, 159 U.S. 36.
Hume v. *Boston*, 255 Fed. 439.
Hollander v. *Heaslip*, 222 Fed. 808.
Cunningham v. *Cleveland*, 98 Fed. 657.
Peck v. *Eliott*, 79 Fed. 10.

VIII.

OBJECTIONS ANSWERED.

It is hinted in the petitioner's brief that this jurisdiction of the Referee should not be recognized because "the referee's Court is without adequate contempt powers to insure orderly trials, has no power to call for the assistance of a jury, etc." (p. 10). In the first place we take issue with the expression "referee's court." The Referee has no court. The Referee is merely an official functioning in the District Court sitting as a Court of Bankruptcy. But passing this, let us analyze the two alleged defects:

(A)

Contempt.

It is true that the Referee is by express statutory limitations (Bankruptcy Act, § 41; Comp. St. 1916, § 9625) enjoined from personally punishing for a contempt, but under this section he is part of the machinery which, once put in operation, results in a proper penalty being inflicted for a contempt. One would not say that a judge had his power to try cases taken away because newer ideas expressed in recent legislation prescribe a trial by jury in certain contempt proceedings instead of leaving the issue wholly in the hands of the trial Judge.

So, in the solution of our present problem, the fact of the ability or inability of the Referee exclusively to inflict the punishment for a contempt neither adds nor subtracts anything. It is beside the point.

(B)

Jury Trial.

Although the authorities are not unanimous, it seems well settled by the weight of decisions that a bill in equity, while not an exclusive remedy, is at least a proper one to recover a preference.

Parker v. *Sherman*, 212 Fed. 917 (C.C.A. 2).
Off v. *Hakes*, 142 Fed. 363 (C.C.A. 7).
Paid v. *N.Y. Nat. Ex. Bank*, 124 Fed. 992, 993.
Parker v. *Black*, 143 Fed. 560; 151 Fed. 18 (C.C.A. 2).
Grandison v. *Nat. Bank*, 220 Fed. 981.
Johnson v. *Hanley Hoye Co.*, 188 Fed. 752.

Other instances where a trustee maintained a bill in equity to recover money and payment preferences are—

Bush v. *Moore,* 133 Mass. 198.
Baxton v. *Ord,* 239 Fed. 503 (C.C.A. 6).
Page v. *Rogers,* 211 U.S. 575.
Van Iderstine v. *Nat. Discount Co.,* 237 U.S. 575, 581.
Getts v. *Janesville Wholesale Grocery Co.,* 163 Fed. 417.
Clarke v. *Rogers,* 228 U.S. 534.
Studley v. *Boylston Bank,* 229 U.S. 523.
In re Plant, 148 Fed. 37.
Contra: Simpson v. *Western Hardware & Metal Co.,* 227 Fed. 304.

If a jury trial in an equity suit is deemed desirable, either the Referee can frame issues and arrange with the District Judge for a jury trial as would be done in other chancery proceedings in the District Court—

In re Rude, 101 Fed. 805

or it has been suggested that a jury can be had, if necessary, upon appeal.

In re Murphy, 3 A.B.R. 499, 507.

But in the argument based on the failure to provide an opportunity for a jury trial in this class of cases sight is lost of the fact that the litigants have not as of right a trial by jury "in case of equity, and of admiralty and maritime jurisdiction—proceedings in bankruptcy" (Comp. St. 1916, §§ 1583, 1584) (Bankruptcy Act, § 19 (C); Comp. St. 1916, § 9603 (C)).

The constitutional guaranty of a right to trial by jury has no reference to equity cases.

Luria v. *United States*, 231 U.S. 9, 27.
Barton v. *Barbour*, 104 U.S. 126, 133.
Wood v. *Henderson*, 210 U.S. 246, 258.
Shields v. *Thomas*, 18 How. 253, 262.

> "Due process of law does not require a plenary suit and a trial by jury in all cases where property or personal rights are involved." "And the courts of chancery, *bankruptcy*, probate and admiralty administer immense fields of jurisdiction without trial by jury."

Ex Parte Wall, 107 U.S. 265, 289.

(C)

It is suggested that the General Order XII (1) contemplates that a Referee shall have no jurisdiction to act in matters other than those which come within the term "proceedings in bankruptcy."

General Orders XII (2) provides that after a general reference such as existed in the present case "the referees may perform the duties which they are empowered by the Act to perform." It seems too plain for argument that the Referees are called on to perform many duties which do not relate to "proceedings in bankruptcy," as distinguished from controversies arising in bankruptcy, and that to limit General Order XII (2) by this restrictive definition of General Order XII (1) is to place an unnecessary hampering narrowness on the words and to create a direct conflict between two sections of the same General Order.

IX.

CONCLUSION.

We submit in the first place that this question was properly presented before the Circuit Court of Appeals in the present proceedings;

Secondly, that, not only under the decisions and in accordance with the long-settled practice in Federal Courts, but also under the correct and logical interpretation of the Bankruptcy Act, the Referee in bankruptcy had jurisdiction to entertain the present action and that the Circuit Court of Appeals for the First Circuit was correct in reversing the District Court;

Wherefore we ask that this Court sustain the action of the Circuit Court of Appeals.

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